

# ANNUAL SPRING PLANNING & ZONING CONFERENCE

*May 8, 2004*

*Sponsored by the New Hampshire Office of Energy & Planning*

## 2004 LAND USE LAW UPDATE

*Presented by*

Timothy Bates, Esquire

*of*

**MITCHELL & BATES, PROFESSIONAL ASSOCIATION**

25 Beacon Street East  
Laconia, New Hampshire 03246



(603) 524-3885 • (800) 785-7409 • Facsimile 524-0745

*e-mail: [tblaw@metrocast.net](mailto:tblaw@metrocast.net)*

# TABLE OF CONTENTS

## SUPREME COURT CASES

### The Variance Hardship Test

<u>Introduction</u> .....	1
<u>Simplex Technologies, Inc. v. Town of Newington,</u> 145 N.H. 727 (2001) .....	2
<u>Rancourt v. City of Manchester,</u> 149 N.H. 51 (2003) .....	8
<u>Bacon v. Town of Enfield, (January 30, 2004)</u> .....	9
<u>Hill v. Town of Chester,</u> 146 N.H. 291 (2001) .....	15

### Nonconforming ("Grandfathered") Uses

<u>AWL Power, Inc. v. City of Rochester,</u> 148 N.H. 603 (2002) .....	16
<u>Town of Salem v. Wickson,</u> 146 N.H. 328 (2001) .....	19
<u>Pope v. Little Boar's Head District,</u> 145 N.H. 531 (2000) .....	22
<u>Town of Seabrook v. Vachon Management, Inc.,</u> 144 N.H. 662 (2000) .....	23
<u>R. J. Moreau Companies, Inc. v. Town of Litchfield,</u> 149 N.H. 312 (2002) .....	25

### Site Plan Review; Assistance to Applicants

<u>Bayson Properties, Inc. v. City of Lebanon</u> 150 N.H. 167 (2003) .....	27
<u>The Richmond Company, Inc. v. City of Concord,</u> 149 N.H. 312 (2003) .....	29

### Appeals

<u>Heartz v. City of Concord</u> 148 N.H. 325 (2002) .....	31
---	----

<u>Hooksett Conservation Commission v. Hooksett ZBA</u> 149 N.H. 63 (2003) .....	32
---	----

### **When Land Use Decisions Are Not Clear**

<u>Robinson v. Town of Hudson</u> 149 N.H. 255 (2003) .....	34
--	----

<u>North Country Environmental Services, Inc. v. Town of Bethlehem,</u> 146 N.H. 348 (2001) .....	35
--	----

### **State Preemption of Local Regulation of Landfills**

<u>North Country Environmental Services, Inc. v. Town of Bethlehem,</u> (March 1, 2004) .....	36
--	----

### **Miscellaneous**

<u>Torromeo v. Town of Freemont and</u> <u>MDR Corporation v. Town of Freemont</u> 148 N.H. 640 (2002) .....	39
--	----

<u>Tidd v. Town of Alton,</u> 148 N.H. 424 (2002) .....	40
--	----

<u>Monahan-Fortin Properties, LLC v. Town of Hudson</u> 148 N.H. 769 (2002) .....	41
--	----

<u>Rallis v. Town of Hampton Planning Board,</u> 146 N.H. 18 (2001) .....	42
--	----

## **NEW HAMPSHIRE SUPREME COURT OPINIONS**

### **THE VARIANCE HARDSHIP TEST**

#### **WHERE HAVE WE BEEN? WHERE ARE WE NOW? WHERE ARE WE GOING?**

##### **INTRODUCTION**

In the case of Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001) the New Hampshire Supreme Court threw out several decades of case law that had defined the circumstances that must be present for an applicant to meet the “unnecessary hardship” test for a variance. Convinced that the test for “unnecessary hardship” had become so restrictive that almost no applicant could meet it, the court articulated a new, more relaxed standard.

Simplex was followed a couple of years later by the case of Rancourt v. City of Manchester, 149 N.H. 51 (2003). In Rancourt, a unanimous court applied the new test in a fairly straightforward manner, upholding the grant of a variance which allowed the landowners to stable two horses on their property in a zoning district where such livestock is prohibited. The result seemed unsurprising, and in keeping with the articulation of the test in Simplex. It thus seemed to many municipal lawyers and local land use officials that the court was settling into a straightforward exposition of the Simplex standard which, although occasional tweaking might occur as cases were decided, would be unlikely to touch off legal fireworks — how wrong this view has now proven to be!

Early in 2004 the court decided the case of Bacon v. Town of Enfield (January 30, 2004), and it appears that the Simplex train may have jumped the tracks! Three of the five supreme court justices agreed that granting the particular variance would be contrary to the spirit of the Enfield Zoning Ordinance (one of the other four variance tests that must be met in addition to the hardship test), and that is the basis upon which the case was ultimately decided. More importantly, four of the justices (two on each side) got into a quarrel about how the first prong of the Simplex hardship test is defined and how it should be applied to variance cases. With two justices on each side of the quarrel, this critical issue was could not be resolved by the court, being left for decision in a future case. If all that were not enough, two of the justices want to create two kinds of variances, and require ZBAs to consider the economic impact that denying the requested variance will have on the applicant!

In an effort to shed some light on the current state of variance law, you will find the following in this section of the materials:

- (1) my original write-up of the Simplex decision as presented in earlier editions of these materials;

- (2) my original write-up of the Rancourt decision;
- (3) my write-up of the new case of Bacon v. Town of Enfield, with notes that try to illuminate the questions and issues that now divide the court.

I end this section with two additional variance cases. The first of these is my original write-up of a variance decision that was issued a few months after Simplex, Hill v. Town of Chester, 146 N.H. 291 (2001). The Hill case concerns itself with self-created hardship and how that issue will be treated under the new Simplex standard. Although it is a useful case to learn about, Hill is not directly relevant to the current battle over the Simplex hardship standard itself. Finally, the case of Robinson v. Town of Hudson, 149 N.H. 255 (2003) offers guidance about prerequisites to taking an appeal to the superior court, and the need for clarity in the ZBA's decision-making.

Let's dive in!

### **SUPREME COURT CREATES NEW TESTS TO DETERMINE WHETHER A UNNECESSARY HARDSHIP@ EXISTS TO JUSTIFY GRANT OF VARIANCE!!**

Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001)

In this case, the supreme court has radically changed the legal definition of what constitutes the Aunnecessary hardship@ that must be found to allow the Zoning Board of Adjustment to grant a variance from a zoning ordinance. The other four variance criteria remain nominally unaffected by the decision, although some elements of each of those other criteria seem to be inherently part of the analysis ZBAs will have to undergo as they apply the new hardship tests.

For decades, for unnecessary hardship to exist, the applicant for a variance in New Hampshire had to show that unless the variance were granted, there would be no reasonable use of the property allowed under the zoning ordinance. Now, the supreme court has decided to substitute a more relaxed test, effective immediately.

The new test for Aunnecessary hardship@ consists of 3 elements, and the applicant must meet each one. For Aunnecessary hardship@ to exist, the applicant must show:

- (1) that the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment;
- (2) that no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and
- (3) that the variance would not injure the public or private rights of others.

Let's look at each of these elements.

## **I. REASONABLE USE**

### **A. General Approach**

- (1) the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment (emphasis added).

Under this element, the ZBA must consider the special circumstances of the particular parcel of land for which the variance is sought. It requires the applicant to show that the zoning restriction interferes with his or her reasonable use of the property. However, the ZBA must make that judgment, not in a vacuum, but considering the unique setting of the property in its environment.

Put another way, whether the proposed use of the property is reasonable depends to a large degree on the setting that surrounds the property. For example, if an applicant is seeking a use variance to allow a pig farm in a residential neighborhood, the ZBA may well conclude that the proposed use of the property is not reasonable considering the unique setting of the property in its environment. In such a case, the ZBA would therefore find that the zoning restriction (that prohibits pig farms in the zone) does not interfere with the reasonable use of the property, considering the unique setting of the property in its environment.

### **B. Must There Still Be Some Unique Characteristic of the Land That Distinguishes it from Other Parcels in the Area?**

As background, recall that in the first place the statute that authorizes the ZBA to issue variances, RSA 674:33, I states that there must be special conditions which will result in unnecessary hardship if the restriction in the zoning ordinance is enforced against the property. Over many years of deciding variance cases, the supreme court took this special conditions requirement, transformed it into a rule that required an applicant for a variance to show that the property has a unique physical problem, and added the further hurdle that the effect of the unique condition of the land coupled with the zoning restriction at issue must be to eliminate all reasonable use of the property.

As Justice Souter wrote in his last New Hampshire Supreme Court opinion, an applicant for a variance must show that there is some unique condition of the parcel of land distinguishing it from others in the area [which] bars any reasonable use of the land consistent with literal enforcement of the ordinance." Crossley v. Town of Pelham, 133 N.H. 215, 216 (1990).



In my view, the courts have been somewhat disingenuous about the requirement that there be some Aunique@characteristic that underlies the unnecessary hardship. By this I mean that when it suited the court to trot out the Aunique@requirement aspect, as in the Crossley v. Town of Pelham case, it would do so. This would typically occur when the zoning restriction at issue did not cause the loss of all reasonable use of the property anyway, so the court could safely recite the platitude about Auniqueness@almost as an aside (ABy the way, many of the other properties in the area have the same problem the applicant's land has, so there's no Aunique@condition that would justify the grant of the variance,@the court would say in such a case).

On the other hand, when the zoning restriction really did cause the loss of all reasonable use of the property, the court would not waste any time examining whether there was a Aunique@characteristic of the lot not shared by others in the area. For example, if a large number of small, non-unique waterfront lots would have trouble complying with the shorefront setback requirements, the court focused only on the Areasonable use@element, not on whether there was some problem unique to the particular lot at issue (because the problem was by no stretch of the imagination unique). See, e.g., Husnander v. Town of Barnstead, 139 N.H. 476 (1995).

I believe the first part of the new variance hardship test has, thankfully, done away with the sham that the applicant must show some Aunique@physical condition of the parcel (keep in mind that Aunique@is a pretty powerful word which requires an absolute, unmodified state, in spite of the manner in which the word is now routinely misused in speech and informal writing). I say this because of the background described above, and because of the plain language of the first part of the test, repeated here:

- (1) that the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment; (emphasis added.)

This language focuses the ZBA's inquiry on the setting of the property, and declares it to **BE** Aunique@as a matter of definition. There is justification for this, in the common notion that every property in its setting really is Aunique@– there is no other parcel in the world in that setting, surrounded by those other properties that have those other characteristics.

So I believe that in this first part of the test the supreme court is telling us to examine whether the applicant's proposed use of the property (which is prevented by the zoning restriction at issue) is Areasonable@in light of the unique setting of that parcel, which will include inquiry into the nature of any existing uses in the surrounding neighborhood. I believe the requirement that the applicant show that there is some Aunique@condition of the

parcel that no other parcel shares has been assigned to the judicial dust bin, where it belongs. Only time will tell as variance cases are decided under the new hardship tests!!<sup>1</sup>

## II. FAIR AND SUBSTANTIAL RELATIONSHIP

- (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property

This element requires the ZBA to identify, in the abstract, the general purpose(s) of the zoning restriction for which the variance is sought. Why does the restriction exist in the first place? What purpose is it intended to achieve? Yes, it is true that the plain language of this test requires the ZBA to identify the general purposes of the entire zoning ordinance and then judge whether those purposes are advanced by the specific restriction in the ordinance that is causing the problem. However, I think this test may be more limited than the language suggests. I would argue that the more logical application of this test requires the ZBA to first identify the general purposes sought to be achieved by the specific restriction (not by the ordinance as a whole, which, of course, will have a host of general purposes, some of which may have little relationship to the specific restriction for which the landowner is seeking the variance).

Next, the ZBA should look at whether those general, abstract purposes are advanced when the zoning restriction is applied to the particular piece of property for which the variance is sought -- this as applied inquiry must also take into account the unique setting of the property in its environment, just like the first element of the hardship test.

Continuing the pig farm example, the general purpose of restricting a zone to residential use is to separate residential areas from non-residential uses that are deemed incompatible, and then to preserve the residential character of the zone once it is established. In most cases, it would be very difficult for an applicant who sought a variance to allow the pig farm to show that there is no fair and substantial relationship between the general purpose of allowing only residential uses in that zone, and the impact of that restriction on the applicant's specific property. That is so because in the atypical case the restriction has exactly its intended effect when it is applied to the applicant's property: it preserves the integrity of an existing residential zone from the impact of incompatible, non-residential uses.

However, one can imagine a situation where there are a number of other farming uses in the neighborhood that are either grandfathered or were established as a result of earlier variances that were issued, so that there is already a strong presence of similar

---

<sup>1</sup>When you read about the Bacon v. Enfield decision later in these materials you will see that the court has divided over just this question: whether a comparison with other properties is required under the Simplex hardship standard.



agricultural uses in the area where the applicant wishes to establish the pig farm. In such a case, the applicant may be able to show that there is no fair and substantial relationship between the general purpose of the zoning restriction that allows only residential uses, and the impact that restriction has on the applicant's property.

### **III. NO INJURY TO PUBLIC OR PRIVATE RIGHTS OF OTHERS**

(3) the variance would not injure the public or private rights of others

This third and final element of the new hardship test requires the applicant to show that the proposal would not injure the public or private rights of others. This encompasses part of one of the four other parts of the variance test that requires the applicant to show that no diminution of surrounding property values will result from the grant of the variance. However, the new third element of unnecessary hardship is broader than just property values. Indeed, the specific reference to the private rights of others raises the (scary!) possibility that the ZBA may now have to consider and actually rule on challenges to variances brought by opponents who claim that the proposed use is prohibited by private covenants in a deed, or because the boundary of the property is disputed, for example. We can only hope that the court did not mean to include that kind of dispute as within the issues that the ZBA must resolve, but only time will tell as new variance cases are decided.

In the meantime, and as a general matter, the ZBA should not be overly concerned about this third element of unnecessary hardship unless there is convincing evidence that there will be a significant decrease in surrounding property values, or some clear harm to public health, safety or welfare if the variance is granted.

### **IV. WHAT ABOUT THE OTHER FOUR PARTS OF THE VARIANCE TEST?**

The applicant must still demonstrate that he or she meets the other four parts of the traditional variance analysis, although there are overlaps between each of those four parts and the new unnecessary hardship test. That is, the applicant must show:

- (1) that no diminution in the value of surrounding properties would occur (we've seen that this overlaps to some degree with the third element of the new unnecessary hardship test);
- (2) that the proposed use would not be contrary to the spirit of the ordinance (overlaps with the second element of the new unnecessary hardship test);
- (3) that granting the variance would not be contrary to the public interest (overlaps with the third element of the new unnecessary hardship test); and
- (4) that granting the variance would do substantial justice (overlaps with the first element of the new unnecessary hardship test).

## **V. IS THE OLD UNNECESSARY HARDSHIP TEST GONE FOREVER?**

As Bernie Waugh points out, probably not. It is possible to imagine a situation where, for example, the applicant could not meet the second element of the new test (because there is a fair and substantial relationship between the general purpose of the restriction and the effect that the restriction has on the applicant's property), but where because of special circumstances the zoning restriction leaves the applicant with no reasonable use of the land.

In such a case, the applicant is still entitled to the variance because without it the applicant's property would be effectively taken by the zoning restriction. It does not appear that the supreme court recognized this aspect of its *Simplex* decision!

## **RETROSPECTIVE APPLICATION AND THE FISHER V. DOVER TEST**

### **I. RETROSPECTIVE APPLICATION**

As explained in Opinion of the Justices, 131 N.H. 644, 649-650 (1989), under common law theory, court decisions and opinions generally operate retroactively, unless the court decides that justice would be better served by limiting the change in the law to prospective application as it did in First NH Bank v. Town of Windham, 138 N.H. 319, 328 (1994) and finally did in its amended decision in Thomas Tool Services, Inc. v. Town of Croydon, 145 N.H. 218 (2000). It seems that the announcement of the new hardship tests in *Simplex* falls into the general category of changes that will operate retroactively.

Under the retroactive application of the new hardship test, several outcomes are possible, depending on whether the ZBA granted or denied the variance and, if the variance was denied, whether the ZBA grounded its decision on any of the other four prongs of the variance test which survived *Simplex*.

### **II. THE FISHER V. DOVER TEST**

Does the holding in *Simplex* allow applicants who were denied variances in the past, and who have no pending appeal, to file a new application for the same use? Not surprisingly, the answer seems to be *It depends.*

Under the holding in Fisher v. City of Dover, 120 N.H. 187, 190 (1980) a subsequent application for a variance where the first one has been finally denied may only go forward where (1) a material change of circumstances affecting the merits of the application has occurred; or (2) the second application is for a use that materially differs in nature and degree from its predecessor.

It seems clear that the announcement of the new tests for unnecessary hardship Simplex, to be applied retroactively, constitute such a material change of circumstances affecting the merits of the application, *where the prior application was denied solely on the grounds that the applicant failed to meet the now defunct unnecessary hardship test*. In contrast, it is hard to see how the new hardship test could rise to the level of a material change of circumstances affecting the merits of the application if the ZBA based its denial on one or more of the four old tests that survive Simplex; in such a case, I suggest that there is a change of circumstances, but that the change is *not material* to the outcome of the prior variance application.

### **SUPREME COURT WASN'T JOSHING WHEN IT RELAXED THE UNNECESSARY HARDSHIP STANDARD TO OBTAIN A ZONING VARIANCE!!**

Rancourt v. City of Manchester, 149 N.H. 51 (2003)

And you thought the court was kidding when it decided Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001)? The Rancourt case is the first time the supreme court has dealt squarely with the unnecessary hardship test since it announced the new standard in Simplex, and there is no doubt that the new "unnecessary hardship" test is very different from the old.

The plaintiffs are abutters to residential property in Manchester owned by Joseph and Meredith Gately. The Gatelys contracted to have a single-family home built on their 3-acre lot. The Gatelys also wished to build a barn to stable two horses on 12 acres located in the rear part of the lot, but livestock, including horses, are prohibited in that district under the zoning ordinance. The Gatelys applied for a variance to allow the horses, which was granted by the ZBA. The angry abutters first appealed to the superior court, which affirmed the grant of the variance, and then to the supreme court, which also affirmed.

The supreme court first noted that in Simplex "we departed from our traditionally restrictive approach to [unnecessary hardship] . . . We thus adopted an approach that was more considerate of a property owner's constitutional right to use his or her property." The court went on to restate the Simplex unnecessary hardship test as follows:

Under Simplex, to establish "unnecessary hardship," an applicant for a variance must show that:

- (1) a zoning restriction applied to the property interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment;

- (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and
- (3) the variance would not injure the public or private rights of others.

The court summed up the new test by stating that applicants for a variance no longer must show that the zoning ordinance deprives them of any reasonable use of the land. Rather, they must show that the use for which they seek a variance is "reasonable," considering the property's unique setting in its environment.

The court noted that the statutory basis for variances, RSA 674:33, I(b) requires that "special conditions" must be present, and pointed out that before Simplex, unnecessary hardship "existed only when special conditions of the land rendered it uniquely unsuitable for the use for which it was zoned." After Simplex, "hardship exists when special conditions of the land render the use for which the variance is sought "reasonable." Thus, in the first prong of the Simplex test, "special conditions" are referred to as the property's "unique setting . . . in its environment." I think the court means by this that there are always "special conditions" present, being each property's unique setting in its environment. The first prong of the new hardship test thus looks at whether the proposed use is "reasonable" given that unique setting.

The facts in this case showed that the Gately's lot was located in a country setting, that it was larger than most of the surrounding lots, was uniquely configured in that the rear portion of the lot was considerably larger than the front, and that there was a thick, wooded buffer around the proposed paddock area. In short, the supreme court agreed that both the ZBA and the trial court could logically have concluded that these "special conditions" (i.e., the property's unique setting in its environment) made the proposed stabling of two horses on the property "reasonable."

### **COURT SPLITS ON HARDSHIP TEST; ARE WE HEADED FOR TWO KINDS OF VARIANCES?**

Bacon v. Town of Enfield, (January 30, 2004)

Maureen Bacon resides in a year-round home on the shore of Crystal Lake in Enfield, and nearly all of the structure is nonconforming as it lies within the 50 foot setback from the lake required under the zoning ordinance. Wishing to convert the home's heating source from wood and electricity, Bacon had a contractor install a propane boiler on the outside of the home, which required the construction of a 4 x 5½ foot shed, attached to the home – this project was undertaken without consulting town's building inspector or zoning administrator.

Like Bacon's home, most of the structures around Crystal Lake encroach to some degree into the 50 foot setback, and the town has interpreted its zoning ordinance to prohibit any new construction that adds to the footprint of such homes without a variance.

When Bacon's neighbor brought the new shed to the attention of the ZBA, Bacon applied for an after-the-fact variance. The ZBA denied the variance because it: (1) did not meet the "current criterion of hardship"; (2) violated the spirit of the zoning ordinance; and (3) was not in the public interest.<sup>2</sup>

The trial court upheld the ZBA's denial of the variance. First, the court found that Bacon had not demonstrated unnecessary hardship under the Simplex standard. Specifically, the court found that the zoning restriction did not interfere with Bacon's reasonable use of the property, because she had previously heated the home with wood and electricity, the boiler could have been installed in the residence, and she could have used a different heating system which would not have required an outside shed. In addition, the court found a "clear relationship" between the purposes of the ordinance and the fifty-foot setback requirement. As the superior court stated in its opinion:

Enfield has a number of significant, valuable natural resources, including a number of lakes, ponds, bogs, and conservation areas. Over the years, the shorefronts of its lakes have become congested as residents enlarged and improved homes on the water. A picture from Crystal Lake of the Bacon and neighbor's lots show the extent of this clutter. Overdevelopment increases the crowding of the land, particularly where the lots are fairly small, reduces the filtration of water run-off into the lake, and reduces the value of a natural resource.

The trial court continued by stating that it believed there was "a clear relationship between the purposes of the ordinance and this specific [fifty-foot] setback restriction." As such, the court found that granting the variance would have "some effect on the public rights of others in that it increases congestion along the shoreline." Consequently, the court found that the variance sought was "not within the spirit of the ordinance," and that granting the variance "would not do substantial justice."

Bacon appealed to the New Hampshire Supreme Court. Three of the five justices of the supreme court agreed with the superior court that the ZBA's denial of the variance was lawful, but the three justices did not agree as to why the denial was lawful. The majority's decision pointed out that in order to affirm the superior court's decision, the supreme court need only find that the superior court was correct that Bacon failed to meet any one of the three variance criteria that the superior court relied upon. In delivering the opinion of the court, Chief Justice Broderick focused on his belief that granting the variance would have violated the spirit of the zoning ordinance, writing

In this case, the fifty-foot setback restriction addresses not just the potential peril of construction on a single lot, but also the threat posed by overdevelopment in general.

---

<sup>2</sup>The correct "public interest" test is that granting the variance will not be contrary to the public interest; a variance applicant is not required to show that granting the variance will actually benefit the public interest – this is a distinction with a difference. See RSA 674:33, I(b) and Gray v. Seidel, 143 N.H. 327, 329 (1999).

While a single addition to house a propane boiler might not greatly affect the shorefront congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant. For this reason, uses that contribute to shorefront congestion and overdevelopment could be inconsistent with the spirit of the ordinance.

Throughout the proceedings, Bacon held the burden of proving all elements necessary for the granting of a variance, including the requirement that the variance will not be inconsistent with the spirit of the ordinance. We recognize that the particular characteristics of the shed at issue here could very easily cause reasonable minds to differ with regard to the level of congestion or overdevelopment engendered by it. Given the evidence before the court concerning further congestion and overdevelopment, the absence of contrary evidence on Bacon's part, and the level of deference in our standard of review to both the factual findings of the ZBA and the decision of the trial court, we cannot find that the trial court erred in concluding that the ZBA "acted reasonabl[y] and lawfully" in denying the variance. (Citations and quotations omitted.)

**The Two Concurring Justices Would Have Reached the Hardship Issue, and Would Have Dramatically Changed It if they Had One More Vote!**

Justices Duggan wrote an opinion (which Justice Dalianis joined) in which he agreed with Chief Justice Brock that the decision to deny the variance was lawful, but which argued that the case should have been decided on the basis that Bacon failed to show that she would suffer unnecessary hardship without the variance. They would have reached the question of hardship because the hardship requirement is the most difficult, and the decision to grant or deny a variance usually turns on the hardship condition. Also, because Simplex had recently changed the definition of unnecessary hardship, the two justices believed that analysis of hardship in the Bacon case "will provide guidance to trial courts and zoning boards when reviewing requests for variances."

Justice Duggan first noted that the Simplex unnecessary hardship standard requires the applicant for a variance to show that:

- (1) the zoning restriction applied to the property interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment;
- (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and
- (3) the variance would not injure the public or private rights of others.

As to the first of the three hardship elements, Duggan argued that Simplex should have added two additional factors that must be taken into account: (1) whether the

variance applied for is a use variance or an area variance; and (2) the economic impact of the zoning restriction on the landowner. Let's look at these two factors.

### **Use v. Area Variance**

Duggan argued that the law in many States recognizes a distinction between a use variance and an area (dimensional) variance, because of the differing impacts each type of variance has on the zoning scheme. A use variance allows the landowner to engage in a use of land prohibited by the zoning ordinance, while an area or dimensional variance involves a use permitted by the zoning ordinance, but allows the landowner to violate a physical standard such as a setback, minimum lot size or the like. Duggan believes that the language of the variance statute, RSA 674:33, I(b), does not prevent the court from adopting the distinction between the two types of variances as a matter of law in New Hampshire.

Although Duggan states the distinction between use and area variances is an important factor in applying the Simplex standard, it is not at all clear to me precisely how Duggan would relax the hardship analysis where an area variance is requested.

### **Economic Impact**

Duggan goes on to argue that in determining whether the zoning restriction interferes with the landowner's reasonable use of the property, we should also take into account the economic impact of the restriction. As with his argument to adopt the distinction between use and area variances, Duggan argues that many other States include the economic impact factor in determining whether the applicant for a variance has established whether unnecessary hardship exists.

Duggan says that, at least with respect to area variances, ZBAs should not grant a variance merely to avoid a negative financial impact on the landowner – the applicant for an area variance must show that there is an adverse economic effect amounting to more than mere inconvenience. However, the applicant for an area variance would not need to show that without the variance the land would be rendered valueless or that the owner would not be able to realize a reasonable return on her investment. Instead, the ZBA must “balance the financial burden on the landowner, considering the relative expense of available alternatives, against the other factors enumerated here and in Simplex.” Good grief!

It is not clear to me from Duggan's opinion how the “economic impact” factor would be applied to either area or use variances.

### **What Is Meant by “the Unique Setting of the Property In Its Environment”?**

Recall that the first of the three prongs of the Simplex hardship test is that: (1) the zoning restriction applied to the property interferes with the applicant's reasonable use of



the property, considering the unique setting of the property in its environment. Also recall that in my original write-up of the Simplex decision I offered the hopeful view that we would no longer have to pretend that the applicant's property had some physical characteristic that was uniquely different from any other properties in the area as a basis to allow the grant of the variance. Well, Duggan rejects my approach and would, if he had two more votes instead of just one, make it clear that under Simplex an applicant for a variance "must show that the hardship is a result of unique conditions of the property, and not the area in general." This is the old saw that says that if other properties share the same physical characteristic that is causing the problem with the applicant's parcel (too small to comply with setbacks, too small and too close to the lake, etc.), the solution is not to grant a variance, but to amend the zoning ordinance to remove or relax the restriction!<sup>3</sup>

Duggan concludes that several factors must be considered in determining whether a variance may be lawfully granted, including the type of variance requested, the economic impact of the zoning restriction and other available alternatives, and the question of whether the property is uniquely burdened compared to other parcels in the area.

Duggan then concurs with Chief Justice Broderick's decision upholding the denial of the variance because Duggan believes that Bacon failed to demonstrate unnecessary hardship. He says that although Bacon requested only an area variance, there was no evidence that alternative locations for the boiler that complied with the zoning ordinance posed a prohibitive cost. Thus, the reason for the variance was nothing more than convenience, and not because of any unnecessary hardship. Duggan also found that Bacon failed to show how her property is unique relative to the other lakeside homes in the same environment that are affected in the same manner by the zoning ordinance. Here again, Bacon failed to demonstrate the existence of an element of unnecessary hardship.

### **The Dissent**

Justice Nadeau wrote a dissent that was joined by retired Chief Justice Brock. These two justices disagreed that granting the variance to Bacon would violate the spirit of the Enfield Zoning Ordinance, writing

Although the trial court found that granting Bacon's variance "would have some effect on the public rights of others in that it increases congestion along the shoreline and reduces minimally the filtration of runoff into the lake," we disagree that these findings, without more, are sufficient to conclude that Bacon's use violates the spirit of the ordinance. Indeed, under this strict standard, any construction within the fifty-foot setback that expands the existing footprint of a home, no matter how minimally, could be deemed to contribute to congestion and alter filtration around the lake to some degree. Consequently, no variance could ever be granted. To interpret this prong of

---

<sup>3</sup>I stand by my critique of this sophistry as expressed on pages 3–4 of these materials.

the variance test so strictly undermines the efforts we have made to make more reasonable the requirements of the test.

These two justices would hold that the environmental impact of Bacon's use is minimal, and therefore "insufficient" to violate the spirit of the ordinance.

Turning to the question of unnecessary hardship, the dissenters (clever people that they are!) clearly endorse my interpretation of the first prong of the Simplex test, that "no comparison of properties is necessary. The first prong of the hardship test is now met when special conditions of the land itself (emphasis in original) render the use for which the variance is sought 'reasonable,' and the ordinance interferes with that use." (Citations omitted.) The dissenters went on to persuasively nail this down, writing

Moreover, we believe that the framework established by the concurrence to evaluate uniqueness is also flawed. Each piece of real property possesses characteristics which contribute to its uniqueness. To hold otherwise would be contrary to our long-standing justification for ordering the specific performance of land contracts. The fact that other properties in the zoning district contain some or even all of the same characteristics does not negate a particular property's uniqueness. Rather, as we have recently articulated in *Rancourt*, uniqueness refers to the special conditions of the property itself. In *Rancourt*, we held that both the trial court and the ZBA could rationally have found that a zoning ordinance prohibiting horses in a low-density residential district interfered with the landowners' reasonable proposed use of their property, considering the special conditions of the property, including the country setting, unusually large lot size, the configuration of the lot, and thick wooded buffer. The physical characteristics of the property itself, rather than the mere fact that those characteristics were not necessarily shared by other lots, rendered the land unique and, accordingly, the proposed use "reasonable." Of the characteristics examined, only the size of the lot was explicitly defined in relation to surrounding properties.

In sum, the dissenters believed that Bacon had satisfied her burden of demonstrating she met the first prong of the Simplex hardship test, and rejected Justice Broderick's conclusion that her variance would violate the spirit of the ordinance.

### **Summation – Where Do We Go From Here?**

I wish I knew! Seriously, I suppose the first thing to point out is that the Bacon decision changes nothing about Simplex. The second point is that we seem to be teetering on the brink of what I would see as an unmitigated disaster that would make the variance work of ZBAs impossible to carry out.

It is quite clear that Justices Duggan and Dalianis need only one more vote on the court to:

- (1) create different standards depending on whether the application is for a use or area variance;
- (2) adopt additional factors that go into the hardship analysis, such as review of the economic impact that would require ZBAs to balance the financial burden on the landowner, considering the relative expense of the landowner's available alternatives, against "other factors enumerated here and in Simplex," and
- (3) insist that the variance applicant show that her property is uniquely situated and therefore bears a burden not shared by other properties in the area.

I have no particular quarrel with the first item, provided clear definitions are provided as to what the different standards are for each type of variance. However, although I have immense personal liking and professional respect for Justice Duggan, it is my view that the further complication of the tests for unnecessary hardship would simply cause most ZBAs to give up. While Duggan's balancing requirements may sound fine when articulated in the hushed corridors of judicial power, in my view the bells and whistles he would bring to the hardship tests are not workable in the real world. As to the third item, I have repeatedly expressed my dislike for the test that requires the variance to be denied unless the applicant can show that the hardship is caused by some physical characteristic of the property that is not shared by other properties affected by the same zoning restriction. In my view, the dissenters are correct that Simplex did away with the need to compare the applicant's property with other properties to see if the applicant's property is uniquely impacted by the zoning restriction. I can only hope that the dissenters' view of the Simplex hardship test will ultimately prevail on the court as Justice Galway takes the seat vacated by Justice Brock, and Chief Justice Broderick is forced to take sides in this fight in a future case.

### **What Do We Do in the Meantime?**

Until the court sorts out the hardship test, I think any ZBA that wishes to deny a particular variance should be sure to base the denial on the four tests in addition to the hardship test, in case the denial is appealed to court. For a variance that is granted, the ZBA must decide affirmatively that the applicant has met all five tests including hardship, so there is no way to protect a particular decision from being the possible next victim of this judicial battle that will eventually determine the nature and scope of the test for unnecessary hardship.

### **SELF-CREATED HARDSHIP IS MERELY ONE FACTOR TO CONSIDER UNDER THE VARIANCE TEST FOR UNNECESSARY HARDSHIP**

Hill v. Town of Chester, 146 N.H. 291 (2001)

In 1997 the Hills bought a 1.3 acre parcel from family members for \$40.00 (yes Virginia, that's forty dollars); the lot was part of a larger parcel owned by the family trust, and title would go back to the trust if the Hills didn't build a house on it within five years.

The lot lacked the minimum lot size and frontage now required under the zoning ordinance (although the lot had been taxed by the town as a buildable lot), and the ZBA denied a variance, partly on the grounds that there was no unnecessary hardship because the trust could have adjusted the size and frontage of the lot to comply with the ordinance -- the hardship was thus not unnecessary, but self-created. The superior court reversed the ZBA, ruling that because the lot was taxed as buildable (until the variance was denied!!) the plaintiffs had no actual or constructive knowledge that the land was nonbuildable at the time they purchased it, and that the hardship was not self-created. The supreme court ruled in favor of the town, sort of.

### **Taxable Status; Knowledge of Zoning Restrictions**

The supreme court breezed through these two issues (the superior court was wrong on both) by repeating the rule that the method by which a town taxes land is not dispositive in determining zoning questions (although it is one factor that can be considered, and might determine the outcome of a close case on bad facts); see Mudge v. Precinct of Haverhill Corner, 133 N.H. 881 (1991). Also, landowners are deemed to have constructive notice of the zoning restrictions that are applicable to their property (which means the law will assume the landowner has read the zoning ordinance even if she hasn't); Trottier v. City of Lebanon, 117 N.H. 148 (1977).

### **Self-Created Hardship and the New Simplex Hardship Tests**

The court then clarified its holding in Ryan v. City of Manchester, 123 N.H. 170 (1983), by ruling that it is "implicit" in Ryan that a self-created hardship does not automatically disqualify the person from receiving a variance, rather, it is just one factor to consider.

Moreover, the court expressly declared that the self-created hardship factor should be considered under the first prong of the hardship test set forth in the Simplex case.

That first prong requires the applicant for a variance to show that the zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment. Thus, if the zoning restriction that interferes with the proposed use comes into play because of self-created circumstances, that fact will certainly have an influence on whether the ZBA considers the proposed use to be reasonable. This factor comes into play not only where the landowner has made some physical change to the property which creates the need for the variance, but also where a landowner purchases property with a perfectly obvious limitation that makes it unsuitable for the intended use under the zoning ordinance.

## **CASES ON NONCONFORMING (“GRANDFATHERED”) USES**

### **HOW MUCH IN-VEST-MENT DOES IT TAKE TO BECOME VESTED?**

AWL Power, Inc. v. City of Rochester, 148 N.H. 603 (2002)

In August, 1987, the Rochester Planning Board approved a development plan for about 24 acres that would create 18 single family homes and a 59-unit condominium. The approval was subject to the condition that the developer construct a number of public improvements on the property, including a sidewalk, a sewer line extension, a fence and a road.

About a year after the planning board's approval, the zoning ordinance was amended, which rendered the proposed condominium and many of the unbuilt single-family houses nonconforming. The city, however, allowed the developer to continue the development according to the 1987 approved plan. During the 3 years that followed the approval, the developer built 6 of the 18 houses, and spent slightly over \$200,000 on the public improvements, finishing the sidewalk and sewer line construction; it also paid the city a \$50,000 impact fee for off-site improvements.

The parties in this case did not dispute that the original developer met the requirements of RSA 674:39 which grants a four-year exemption from subsequently enacted zoning restrictions, running from the date of recording of an approval, provided the builder begins "active or substantial development" on the property within 12 months of the approval. The parties thus agreed that the city could not have blocked the developer's proposed construction under the amended zoning ordinance until at least August, 1991 (4 years from the original approval).

In 1990, all construction ceased on the site because of the downturn in the real estate market, and the developer did not seek to resume construction for 10 years. In April, 2000 the developer notified the city of its intention to finish the project. In response, the city reviewed the project and determined that the developer had completed 43.2 percent of the required public improvements, and 10.7 percent of all the combined public and private improvements. Based on this study, and following a public hearing, the planning board found that the developer's right to complete the project had not vested, and that the changes in the zoning ordinance, no longer stayed by the statutory four-year exemption, barred the completion of the project. Based on this finding, the planning board revoked the 1987 project approval.

The developer appealed to the superior court, arguing that the right to complete the project had vested and could not be revoked. The superior court compared the \$200,000 that had been spent on the public improvements to the projected cost of the entire development which was almost \$6,500,000. Without taking into account the completion of the 6 houses, the court concluded that the developer had completed only about 3% of the project, and agreed with the planning board that this small percentage was insufficient to

constitute the "substantial construction" necessary to vest the right to complete the project under the common law standard articulated in the case of Piper v. Meredith, 110 N.H. 291, 299 (1970).

**Test to Determine "Substantial Construction" is Absolute, Not Relative (Sometimes)**

On appeal, the supreme court ruled that the trial court had used the wrong approach in considering what percentage of the overall project had been completed before the zoning ordinance was amended. The court outlined the following three bases for its rejection of the "percentage of completion approach" to vesting:

1. Prior cases do not support the "percentage of completion approach"

The court looked at some of the earlier cases about vesting and pointed out that "we have never held that completion of a certain percentage of construction is the exclusive method by which the rights of a developer may vest," and that in the case of Piper v. Meredith, 110 N.H. 291, 299 (1970) the court had gone out of its way to declare that "each case presents a question of fact peculiar to its own set of circumstances."

2. The "percentage of completion approach" conflicts with the common law rationale for vesting

The court said that common law vesting rights stem from the developer's good faith reliance upon the absence of land use regulations that prohibit the project, and for that reason courts should be liberal about how and when such "good faith" vested rights are created. Against this liberal approach, the supreme court clearly felt that the superior court had simply set the vesting bar too high by using the "percentage of completion approach."

3. The "percentage of completion approach" would lead to anomalous results

Finally, the supreme court said that the "percentage of completion approach" would unfairly burden developers with large or complex plans compared to smaller projects. The court noted that

"In fact, the city's application of this standard has already led to disparate results. At about the same time it considered this case, the city determined that another developer, who had spent no more than \$143,000 on his approved plan, had acquired a permanent, vested right to complete his project. The rationale for this decision was that the total cost of the other developer's project was only several hundred thousand dollars, and that the construction completed by the developer thus constituted a substantial percentage of the total. While consistent with the reasoning used by the city and trial court in this case, the trial court's standard places as much emphasis on the size of the overall project as it does on the actual reliance of the developer. We thus hold that the superior court erred as a matter of law in interpreting the "substantial construction" standard."

Thus, the supreme court concluded that the correct standard to determine whether "substantial construction" has occurred will take into account not only construction measured against the entire plan, but also whether the amount of completed construction is *per se* substantial in amount, value, or worth. The court agreed with the developer that its expenditure of over \$200,000 on public improvements and construction of six houses was enough to meet the "substantial construction" standard in this case.

The court also clearly left the door open to apply the "percentage of completion approach" to the vesting of smaller projects where good faith expenditures might not seem *per se* substantial. However, the main point is that "in cases where construction expenditures amount to large sums, construction need not be judged by comparison to the ultimate cost of the project."

### **Vesting Will Not Always Depend Only on Public Improvements**

The supreme court rejected the developer's argument that vested rights should depend only on whether the developer has made "significant expenditures" on the public improvements to the land. The court said that while it is possible that a developer may acquire vested rights solely by the construction of public improvements, that will happen only if the construction was "substantial" and not merely because it constituted a certain percentage of the total public improvements.

### **What Good is The Vesting Statute, RSA 674:39?**

Last, the developer had argued that the four-year vesting statute, RSA 674:39, establishes a standard for the acquisition of vested rights that is easier to meet than the standard developed over the years as the court has decided cases such as Piper v. Meredith (the common law). The court disagreed with this, confirming its earlier ruling in Morgenstern v. Town of Rye, 147 N.H. 558, 563 (2002) that the test for vesting under the statute and at common law is the same.

Indeed, the court pointed out that the principal benefit of the vesting statute for developers is that it provides a developer with additional time (four years) to meet the common law vesting standard of having completed "substantial construction" of the project -- the statutory four years becomes available to the developer if she begins "active or substantial" construction within one year of the approval of the project. The statutory protection is significant; recall that at common law even an approved project could be stopped dead in its tracks if a subsequent land use amendment prohibiting the project was enacted before common law vesting had occurred.

### **FORMER ACCESSORY USE NOT ALLOWED TO BECOME THE PRINCIPAL NONCONFORMING USE (OR, DON'T GIVE UP THE PIGS!!)**



Town of Salem v. Wickson, 146 N.H. 328 (2001)

Richard Wickson owns a 4.1 acre vacant lot in Salem that had been used as a working farm, including pigs, since the 1950's; the farming use became nonconforming when the town's first zoning ordinance was adopted in 1961.

As part of the farming activities, horse, chicken and pig manure were stockpiled, and sand and other materials were brought onto the site to be mixed with the manure; this material was then trucked off the property to market. In 1988, Wickson voluntarily removed the animals and buildings and ceased the farming operation with the intention of establishing a nursery for which he had received site plan approval, but the nursery was never built. It does not seem to have been disputed that Wickson voluntarily abandoned the principal, nonconforming use of farming; see Lawlor v. Town of Salem, 116 N.H. 61 (1976) for a discussion of how to evaluate whether a nonconforming use has been abandoned.

Instead, Wickson continued to use the lot to stockpile earth materials, involving the delivery of some twenty-five eighteen-wheel truckloads per week. In 1990 the town notified him that the stockpiling was not a permitted use, and eventually filed a petition in the superior court seeking an injunction against the use. After a two day trial, the superior court judge dismissed the town's petition, ruling that the use of the property for stockpiling had been continuous and essentially unchanged since the 1950's and was therefore a lawful, nonconforming use.

On appeal, the town argued that when Wickson abandoned the nonconforming farming use of the property, he also abandoned all nonconforming uses incidental to pig farming, including his right to stockpile earth materials; therefore, the continued stockpiling constitutes a substantial change in use. Wickson argued that to determine whether a substantial change in the nonconforming use had taken place, the superior court correctly focused on the consistency of the stockpiling activity, and not whether that activity was incidental to the farming operation that had been abandoned; that is, Wickson argued that no change had occurred because the stockpiling activity still consisted of manure being mixed with earth products for commercial sale just as when the farm existed.

**Tests to Evaluate Whether Change to Nonconforming Use is Allowed**

In its analysis, the supreme court first repeated the approach set out in earlier cases that to determine whether there has been a substantial change in the nature or purpose of the pre-existing nonconforming use, which is not allowed (unless the local zoning ordinance says otherwise) the court will consider:

- (1) the extent the challenged use reflects the nature and purpose of the prevailing nonconforming use;

- (2) whether the challenged use is merely a different manner of utilizing the same use or constitutes a use different in character, nature, and kind; and
- (3) whether the challenged use will have a substantially different effect on the neighborhood.

So, the first task is to determine the nature and purpose of the use that was in place when the zoning ordinance went into effect (always the Amagic moment@in this part of the analysis). The court concluded that the nature and purpose of the nonconforming use in 1961 was for pig farming and that the stockpiling activity was incidental and subordinate to the farming activity.@ (As shorthand, this finding is the equivalent of a finding that the stockpiling was an Accessory@use in support of the principal use of farming.) The court noted that the courts in some other States have adopted a firm rule that a nonconforming use that is accessory to a principal use can never be converted to a principal nonconforming use, but declined to consider adopting that hard and fast rule on the technicality that the town had not argued that the rule should be adopted when the case was before the superior court.

Because it refused to adopt the hard and fast rule (but did it, really?? -- see below!), the court went on to consider whether Mr. Wickson's revised stockpiling activity constitutes a use different in character, nature and kind. The court ruled that it does, observing that at the time the zoning ordinance was adopted in 1961 earth materials were brought onto the lot and stockpiled to assist in removing a by-product of the principal pig-farming activity -- the character and nature of the stockpiling after the farming was abandoned is wholly unrelated to pig farming, and all materials are brought in from off-site. Therefore, the supreme court rejected the superior court's finding that the use had remained essentially unchanged since before zoning was adopted.

The heart of the case lies in the court's disagreement with Mr. Wickson's argument that any use that is Asimilar@to the nonconforming use for stockpiling is a natural expansion of that nonconforming use, since the argument Amisconstrues the purpose of the right to continue a pre-existing lawful use.@ The court went on to explain:

The right to continue a pre-existing lawful use vests in the property because a substantial reliance has been placed on that use . . . at the time the ordinance creating the nonconforming use was enacted. Accordingly, nonconforming uses may be expanded, where the expansion is a natural activity, closely related to the manner in which a piece of property is used at the time of the enactment of the ordinance creating the nonconforming use. Here, any claim that substantial reliance had been placed upon the use of the lot for stockpiling was directly related to the nonconforming use of the property as a pig farm. The fact that the stockpiling activity of mixing manure with earthen materials has continued without interruption is irrelevant, because the right that vested with the property was to continue pig farming. Therefore, unless the stockpiling is closely related to the pig

farming, it is not the expansion of a natural activity closely related to the nonconforming use.

The court went on to find that the stockpiling also flunked the third part of the test, since the use does have a substantially different effect on the neighborhood (It is inconceivable that sixty-five pigs could create enough waste to require anywhere near the twenty-five eighteen-wheel truckloads per week involved in the new stockpiling operation). However, that finding was not critical to its decision, and is an anticlimax.

### **When Is a Firm Rule Not a Firm Rule??**

Although the court said it would not adopt a firm rule that an accessory use can never be converted to a principal nonconforming use as the town had requested, the practical effect of its decision may amount to the same thing. The court was unequivocal that the right that vested with the property was to continue pig farming, which was the principal use of the property that became nonconforming the moment the zoning ordinance was adopted in 1961. Since the principal use was later abandoned, the new stockpiling activity could not be the expansion of a natural activity closely related to pig farming because there is no more pig farming. Therefore, how could a use that was accessory to a former nonconforming use that was then discontinued ever be allowed as a substitute, principal nonconforming use of the property?? It seems logically impossible, because the former accessory use will never be able to claim that it is still closely related to the former principal use. Sure seems like a firm rule to me!!

### **PLAINTIFF MUST PROVE THAT DISCRIMINATORY ENFORCEMENT OF ZONING ORDINANCE WAS CONSCIOUS AND INTENTIONAL; SOME INTENSIFICATIONS OF NONCONFORMING USES ARE ALLOWED AS A MATTER OF RIGHT**

Pope v. Little Boar-s Head District, 145 N.H. 531 (2000)

The plaintiff owns a small ice cream stand, the Beach Plum, in the Little Boar-s Head District of the Town of North Hampton. Established before the area was zoned residential in 1937, the operation was closed during World War II, and re-established under a conditional variance in 1946. The conditional variance restricted items sold from the stand to principally products of the owner-s dairy, and only for the retail sale of his ice cream, cream, milk, buttermilk, frappes, and other dairy products, hot dogs, tonics, candy, popcorn, potato chips, peanuts, cigarettes, cigars, and chewing gum.

Interestingly, there is a small restaurant located just a few hundred yards from the Beach Plum, called Andrews-by-the Sea; in 1992 the District Board of Commissioners, after an informal meeting (!!!), granted Andrews-by-the Sea a one-year permit for a take-out window. Then, in a 1993 letter, the building inspector and commissioner, without conducting a hearing (!!!), gave Andrews-by-the Sea permission to operate the take-out window permanently.

In 1996, Mr. Pope, the latest owner of the Beach Plum, applied for a special exception under the zoning ordinance to expand his menu items to include coffee, tea, hot chocolate, hamburgers, cheeseburgers, muffins, doughnuts, pastries, and cold sandwiches. He did not seek to make any physical alteration to the building, but claimed that he was seeking to intensify his nonconforming use. The special exception was denied, which was particularly unsettling to Mr. Pope in light of the easy time his competition had at Andrews-by-the Sea.

Mr. Pope appealed the denial of the special exception to superior court, alleging that (1) it is unlawful for the District to not have a provision in its zoning ordinance so that a property owner can receive permission to intensify, as opposed to expand physically, a nonconforming use; and (2) the District applied the zoning ordinance in a discriminatory manner because of the way it allowed his competitor, Andrews-by-the Sea, to install a take-out window. The superior court judge was so upset about what seemed to him to be blatant discrimination that he never ruled on the first argument. Instead, the judge found that the District had enforced the zoning ordinance in a discriminatory manner, and ordered it to either allow the expanded sales requested by Mr. Pope, or enforce its ordinance against all businesses similarly situated and in direct competition with Mr. Pope. The District appealed to the supreme court.

On appeal, the supreme court stated flatly that a finding that a municipality selectively enforced its zoning ordinance in a discriminatory manner requires evidence that any discrimination was conscious and intentional. Although that is an incredibly hard thing to prove, it seems an appropriate burden to avoid a situation where good faith, but uneven or negligent, enforcement decisions could allow similarly situated property owners to simply ignore the ordinance. Certainly such a result would not be in the public interest and it is for that reason that the court has justifiably set the bar in a very high place when a plaintiff claims discrimination. Because the superior court did not consider whether any discrimination was conscious and intentional, the supreme court remanded the case (sent it back down to the superior court) for further proceedings.

### **Nonconforming Use v. Use Allowed by Variance**

The poor old much-maligned supreme court had its eyes wide open on this one! It went on to point out that although everybody was arguing about the Beach Plum being a pre-existing nonconforming use, it seemed to the court that it really is a use established (or at least re-established) after zoning was adopted by virtue of the conditional variance that was granted in 1946. As such, perhaps Mr. Pope should have sought a modification of the conditions placed on his variance, rather than seeking a special exception under the ordinance. In this regard, the supreme court recognized the authority of the ZBA to modify conditions previously imposed with respect to the grant of a variance.®

### **Intensification of Nonconforming Use as a Matter of Right**

The supreme court also pointed out that if Andrews-by-the Sea is a nonconforming use, the addition of the take-out window that seems so improper because permission for it was granted without any public proceedings may have been permissible as a matter of right. That is so because it is the law that a property owner who seeks to expand or intensify a nonconforming use internally may do so as a matter of right if the intensification will not result in a substantial change to the effect of the use on the neighborhood. See Ray's Stateline Market, Inc. v. Town of Pelham, 140 N.H. 139 (1995). Thus, on remand the superior court should also consider whether the uproar about the different treatment afforded Andrews-by-the Sea was merely a tempest in a teapot.

**TEST FOR EXPANSION OF A NONCONFORMING USE IS MORE RESTRICTIVE THAN THE TEST FOR "CHANGE OF USE" FOR SITE PLAN REVIEW**

Town of Seabrook v. Vachon Management, Inc., 144 N.H. 662 (2000)

In 1990, the defendants opened a business known as "Leather and Lace" in unit one of a six unit building on Route 1 in Seabrook - the business sold adult books, magazines, videotapes, and paraphernalia and later installed coin-operated video booths. The adjacent unit, unit two, was occupied by a third party who used it for retail computer equipment sales. For some time, Leather and Lace also presented live entertainment in unit one, including mud and oil wrestling, but that activity stopped in unit one after the town's building inspector informed the owner that the addition of live entertainment would require site plan approval from the planning board since it constituted a change of use from retail sales.

In fact, as soon as the computer sales operation moved out of unit two in 1992, Leather and Lace expanded into it without notice to the town, and began offering mud wrestling and bachelor parties. Eventually, part of the wall separating the two units was removed, and live nude dancing was substituted for the mud wrestling and bachelor parties in unit two.

In 1994 the Town of Seabrook amended its zoning ordinance to regulate sexually oriented businesses; the regulations prohibit any such business from operating within 1,000 feet of a place of worship, 300 feet of a residence, or 500 feet of the town boundaries. Leather and Lace violated the new restrictions by virtue of its proximity to the town border, a residence and a church.

In 1997 the town discovered that unit two was being used for live nude dancing and sought an injunction in superior court to stop it. Following a trial, the superior court denied the injunction, finding that mud wrestling was a preexisting nonconforming use that was unaffected by the 1994 zoning amendment, and implicitly concluding that live nude dancing was a lawful expansion of mud wrestling.

The supreme court reversed, agreeing with the town that live nude dancing in unit two is not exempt from the 1994 ordinance as a grandfathered use. The key to the decision is that only lawful preexisting uses are protected from later enacted zoning restrictions, so that they may continue as nonconforming uses. When unit two was changed from computer sales to mud wrestling in 1992, it was a change of use from "retail" to "commercial entertainment" under the ordinance at the time. In order to be lawful, the owner was required to seek and receive site plan approval for the change from the planning board. Since the owner never applied for site plan approval, mud wrestling was never lawfully established and therefore neither it nor the later addition of live nude dancing were protected from the restrictions imposed by the 1994 sexually oriented business amendment.

The court went on to provide clarification as to when a change of use is sufficient to trigger the need for site plan review. The defendants argued that in order to require site plan approval, the change in use must be substantial, a test similar to that used to determine if an expansion of a lawful nonconforming use is permitted. The court disagreed, ruling that

the purpose of requiring site plan approval is to assure that sites will be developed in a safe and attractive manner and in a way that will not involve danger or injury to the health, safety or prosperity of abutting property owners or the general public. If a town is not permitted to review site plans for all changes in use, it will be unable to measure the impact of such changes on the existing infrastructure and site conditions to protect the public health, safety, and welfare.

**PRACTICE POINTER:** Do not confuse the court's ruling that all changes of use are subject to site plan review (assuming, of course, that the new use is either multi-family or nonresidential as provided under RSA 674:43, I) with the incorrect idea that any change to an existing use is subject to site plan review. The court's ruling does not address expansion of an existing use, such as adding a table or two to an existing restaurant. It merely states that when a restaurant changes to, say, retail sales, site plan review is required even if the owner argues that the changed use is not substantially different from the existing use, or that the impact on the surrounding properties, traffic patterns and the like, will not change.

#### **FOUR-YEAR EXEMPTION UNDER RSA 674:39 APPLIES TO IMPACT FEES**

R. J. Moreau Companies, Inc. v. Town of Litchfield, 149 N.H. 312 (2002)

The plaintiff in this case owns lots in two subdivisions in Litchfield. Final subdivision approvals were recorded at the registry of deeds on October 13, 1999 and August 17, 2000.

The town had an impact fee ordinance that applied to the lots in those subdivisions, for the purpose of offsetting the increased demand on municipal facilities and schools caused by residential development. Under the ordinance, the impact fee schedules could be reviewed and revised periodically by the town's planning board, subject to the approval of the board of selectmen.

At the time the two approved plans were recorded the amount of the impact fee was \$.91 per square foot. On March 14, 2000 the town amended its ordinances to authorize the planning board to modify its method of calculating the amount of the impact fees, and on August 22, 2000 the planning board adopted a new impact fee schedule set at \$3.801 per square foot of living area, more than four times the original fee. The selectmen approved the new schedule on August 28, 2000, effective immediately.

When the developer subsequently applied for building permits for its lots, the town required it to pay impact fees under the new schedule. The developer paid the new fees, but appealed to the planning board and then to the superior court, arguing that the four-year exemption from zoning changes under RSA 674:39 protected it from having to pay the higher fees because the subdivision plans were approved and recorded before the new fee schedule became effective. The superior court agreed with the developer, as did the supreme court when the town appealed.

On appeal, the supreme court first noted that the authority to adopt "innovative land use controls" such as impact fees derives not from its general police or taxing power, but from its statutory power to enact zoning ordinances under RSA 674:16, II and RSA 674:21. Moreover, RSA 674:39 provides, in relevant part:

Every plat or site plan approved by the planning board and properly recorded in the registry of deeds shall be exempt from all subsequent changes in subdivision regulations, site plan review regulations, and zoning ordinances adopted by any city, town, or county . . . except those regulations and ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements, for a period of 4 years after the date of the recording . . . provided that:

I. Active and substantial development or building has begun on the site by the owner or the owner's successor in interest in accordance with the approved plat within 12 months after the date of approval . . .

The supreme court rejected the town's argument that the protection afforded by the statute should be limited to changes to land use ordinances (or entirely new ordinances) that have the effect of prohibiting completion of the development in accordance with the approved plans -- impact fees do not prohibit a project's completion but are merely additional costs imposed on a developer. Instead, the court ruled flatly that "RSA 674:39 plainly encompasses all zoning ordinances, whether or not they will have the effect or purpose of stopping an approved project. If the legislature had wanted to exempt impact fees from the reach of RSA 674:39 (as it did for ordinances which expressly protect public



health standards, such as water quality and sewage treatment requirements) it could have included them in the statutory exceptions.®

The supreme court's opinion is not exactly as straightforward as it may seem. I am one of at least a handful of municipal lawyers who saw (and still see) strong arguments in support of Litchfield's position, not the least of which is the clear language in RSA 674:39 that it protects the "improvements as shown on the plat" from subsequent changes in land use ordinances. Since impact fees that are first enacted or increased after the approval and recording of a development plan do not require any changes to such protected improvements, the court could have persuasively reasoned that the statute does not interfere with such fees. Also of consequence to this line of reasoning is the declaration in RSA 674:21, V that an impact fee is "a fee or assessment imposed upon development." As such, impact fees are in the nature of a tax, and you can be confident that the courts are not going to protect approved developments from later increases in property taxes, sewer assessments and the like!!

**PRACTICE POINTER:** Because the supreme court has ruled that impact fees are treated just like a "normal" zoning restriction for purposes of the "grandfathering" provided under RSA 674:39, you may run into a situation where the four-year protection has expired without the project having acquired vested rights to be forever free from later changes to the zoning ordinance. For example, you might have a case like AWL Power v. City of Rochester, reported above, with the difference that the developer stopped work for many years after it did not complete "substantial construction" within the four-year protected period so as to gain vested rights (or, maybe the developer never did start "active and substantial" development within 12 months of approval, so the project never even had the benefit of the four-year exemption in the first place). On those facts, if the project is later restarted (and is allowed to go forward because the substantive land use regulations still allow it) it would be subject to impact fees that were first adopted or increased after the original approval was granted.

### **SITE PLAN REVIEW; ASSISTANCE TO APPLICANTS**

#### **PLANNING BOARD WAS REASONABLE IN REQUIRING ADDITIONAL BUFFERING TO PROTECT ABUTTING RESIDENTIAL USE**

Bayson Properties, Inc. v. City of Lebanon, 150 N.H. 167 (2003)

Bayson sought site plan approval for the construction of a 56,000 square foot Hannaford grocery store on its property, along with a parking lot to accommodate 302 cars. Over the course of several months, the planning board held seven public hearings on the application and conducted an official site visit; most of the public hearings exceeded three hours in length. Finally, by a four to three vote, site plan approval was denied for failure to comply with landscaping and traffic provisions in the site plan regulations. Bayson and Hannaford appealed to the superior court, and the court upheld the denial.

The supreme court agreed that the board's denial was supported by the evidence and not legally erroneous. The major issues are described as follows.

### **Bias of Planning Board Chairman**

The acting chair of the planning board had participated in an earlier effort to rezone the property so that it could not be used for commercial purposes, but the city council had declined to change the zoning. At the first public hearing, the chair did exactly the right thing: she disclosed that she had been in favor of the rezoning, but had no problem with chairing the board's review of the site plan in a fair and impartial manner. She also asked any planning board member who could not act fairly and impartially to step down, but no member did so. The chair then asked if the applicant or any member of the public believed that any member of the board was prejudiced with respect to the site plan application they should please offer their objection, stating which board member should step down and why — no objections were raised.

Three months later the applicant's attorney made a vague reference at a public hearing about his feeling "that there are people on the Board who do not appear to like the fact that it is a commercial zone and the proposed use is an allowed use."

On appeal, the supreme court restated the rule that an objection to the impartiality of a member of a land use board member must be raised "at the earliest possible time" so that the matter can be addressed and corrected if necessary. Because the chairman raised the matter of her involvement in the rezoning effort at the beginning of the first public hearing, the applicant lost its right to later complain because it did not challenge her impartiality at that time.

### **Additional Buffering Required**

The applicant sited the grocery store on that portion of the lot that most closely abuts those lots on which residential or low-intensity office uses were already situated. Moreover, the most intensive activities, the site driveway and loading dock, was proposed to be placed less than fifty feet from a Genesis Elder Care Facility on an adjacent parcel! The planning board determined that to adequately protect the residential uses of the surrounding sites, a twenty-five foot landscape buffer and additional buffering would be required "to remediate negative sight, noise and pollution impacts attendant to the proposed development, with respect to the abutting Genesis Elder Care Lot." On appeal, the applicant argued that the twenty-five foot buffering would have provided adequate noise protection for abutting residences, and that no additional buffering was necessary. The court upheld the planning board's judgment, based at least in part of the difficulty of enforcing some voluntary restrictions which the applicant proposed, as follows:

The plaintiffs expect truck deliveries to the site of from two to four tractor-trailers per day, two to three days per week, and up to forty smaller vendor trucks per day. The plaintiffs offered to limit truck delivery hours to the site from 5 a.m. through 9 p.m. to

alleviate noise generated from idling trucks, braking, back-up warning beeping, truck doors opening and closing and dock loading and to build a twenty-five-foot tall wall. The board found, however, that such voluntary provisions were "unrealistic" and "unenforceable" because: (1) "it is unclear to what extent the applicant can enforce the proposed restrictions on private vendor trucks"; (2) "testimony . . . indicate[d] that turning diesel truck engines on and off may be harmful to the longevity of such engines and that refrigeration compressors on some trucks would likely not be turned off during deliveries"; (3) the "difficulties inherent in enforcing the proposed restrictions . . . due to lack of city enforcement staff and the intermittent nature of potential noise and activity violations"; and (4) "the fact that many residents of the Genesis Elder Care facility sleep during the times in which the applicant anticipates the most intensive loading/unloading activities would take place."

The trial court found that "in light of these problems with the plaintiffs' voluntary restrictions, any one of which would be enough to support a finding of reasonableness on the Board's part, . . . the Board's finding, that the restrictions would not fully remediate potential noise concerns, thus justifying the imposition of additional buffers, was reasonable."

**PRACTICE POINTER:** Perhaps the most interesting aspect of this decision is the fact that the planning board was allowed to reject the efficacy of the applicant's voluntary restrictions based on the difficulty of enforcing those restrictions. In other words, a planning board is not required to accept voluntary restrictions proposed by an applicant that attempt to mitigate impacts on surrounding properties – the planning board can still deny the application if it reasonably determines that enforcement of those voluntary restrictions would be difficult, if not impossible. Perhaps this outcome doesn't seem too surprising, but it is surely nice to have the court confirm in plain language the board's authority to reject such restrictions!

### **Guidance Offered to Applicant**

On appeal, the applicant also argued that the planning board held it to such an impossibly high standard that the practical effect was to rezone the property so that no commercial use could be made of it. The court rejected this argument, finding that, to the contrary, "the board provided the plaintiffs with ample input and guidance for bringing the application into compliance with the site plan regulations." Also telling on this point was the fact that the board's denial of the application had been made "without prejudice to the applicant's right to submit a revised application that adequately addresses the Board's concerns." The fact that the plaintiffs were unwilling to reduce the size of the proposed building, relocate the proposed building or substantially change the layout of its site plan to enable it to meet the concerns of the board, does not establish a "rezoning" of the property.

### **COURT REAFFIRMS PLANNING BOARD'S OBLIGATION TO PROVIDE ASSISTANCE TO APPLICANTS**

The Richmond Company, Inc. v. City of Concord, 149 N.H. 312 (2003)

In this case, the supreme court reaffirmed the obligation of municipalities to provide assistance to those seeking land use approvals, and held that the Concord Planning Board had behaved properly in this case. Let's take a look at the details.

Richmond applied to the Concord Planning Board for site plan approval to construct a shopping center, including a supermarket, on a 34 acre parcel off South Main Street in Concord. The proposal called for the demolition of all existing structures on the property and the construction of four retail buildings with a total of approximately 180,000 square feet. Given the location of the property, the applicant was required to satisfy the requirements for development standards and special design criteria in the city ordinances.

Following several public hearings at which testimony and documentary evidence were received, the board voted unanimously to deny Richmond's site plan application because it failed to meet the requirements of city ordinance 28-11-7. Specifically, the board concluded that the Richmond project failed to satisfy criteria of the ordinance in that:

- 1) the project would not generate either a short term or long term expansion of the city's economic base;
- 2) the applicant's economic impact statement did not adequately address the fiscal costs and net fiscal impacts to the city for municipal services;
- 3) the application failed to address certain ancillary employee benefits;
- 4) the project was incompatible with the existing architectural and historic character of the area; and
- 5) the project was not specific to the site and the design did not enhance the scenic and/or recreational uses of the South End Marsh, which is part of the Merrimack River watershed and floodplain.

Richmond appealed to the superior court, which found that the planning board's decision was not supported by the evidence and that the board failed to share any of its concerns regarding Richmond's compliance with the city ordinance, thereby depriving Richmond of the opportunity to address and remedy any problems – thus, the court held, the planning board had failed to engage in a good faith dialogue with Richmond to assist it in satisfying the requirements for site plan approval. The superior court then remanded the case back to the planning board, and both sides appealed to the New Hampshire Supreme Court (Richmond appealed because it didn't want to go back to the planning board, it said the superior court should simply have granted it site plan approval).

On appeal, the supreme court reminded towns “that it is their function to provide assistance to their citizens, and that the measure of assistance certainly includes informing

applicants not only whether their applications are substantively acceptable but also whether they are technically in order.”

Richmond argued that the board failed to provide meaningful assistance because it did not comment on or question the substance of Richmond’s application during the public hearings as it related to the city ordinance. The supreme court disagreed, saying that this was not a case where the board ignored the application or otherwise engaged in dilatory tactics in order to delay the project – indeed, the court ruled that it was appropriate for the board to “maintain a certain level of impartiality” during the public hearing process. Also, the court pointed out that Richmond acknowledged that its site plan project received “rigorous review,” and that it was appreciative of the input from the board, city staff and the public throughout that application process. It further stated that “well prior to the submittal of the Application, the Applicant discussed its plans for the area with City Administration, the City’s Engineering and Planning Departments, City Councilors and numerous others.”

Moreover, throughout the hearings, members of the public commented on whether Richmond’s project complied with the applicable section of the city ordinance. At the close of the hearings the board allowed Richmond to offer rebuttal testimony. Further, Richmond filed a detailed letter with the board on the final day the board accepted evidence, addressing issues raised throughout the hearing, including issues relating to the project’s compliance with the criteria in the city ordinance. The court held that fact that the board did not comment on the suitability of the project in response to Richmond’s inquiries prior to its deliberative session and vote is neither inappropriate nor unusual since the purpose of the board’s deliberative session is to decide the issues.

**PRACTICE POINTER:** Although the court did say it is appropriate for the planning board to “maintain a certain level of impartiality” during the public hearing process, the point of this case is that it is clearly the planning board’s job to give guidance to the applicant about what may be wrong with its development proposal, both from a technical (there is stuff missing that you need to provide) and from a substantive standpoint (here is where we think your proposal doesn’t comply with our land use regulations). Don’t just lie back watching the show, and then hand out a denial after the public hearing process is closed – have a dialogue with the applicant as you go through the process, giving the applicant an opportunity to adjust the proposal to meet your legitimate concerns and those of the abutters and other interested persons.

## **APPEALS**

### **APPEAL FROM PLANNING BOARD’S INTERPRETATION OF THE ZONING ORDINANCE MUST FIRST GO TO THE ZBA**

Heartz v. City of Concord, 148 N.H. 325 (2002)

The complicated facts of this case are not important to our understanding of the rule that comes out of it. The supreme court interpreted the provisions of RSA 676:5, III, which gives the ZBA authority to review the planning board's interpretation of the zoning ordinance, as being mandatory in order to preserve the right to appeal to court.

In other words, if an applicant or abutter is not happy with the planning board's interpretation of the zoning ordinance in the course of its review of a subdivision or site plan application, that unhappy person MUST first appeal that portion of the planning board's decision to the ZBA in order to preserve their rights to eventually seek court review. If the unhappy person DOES NOT first appeal to the ZBA, she gives up her right to bring the zoning portion of the matter to court.

**PRACTICE POINTER:** Frequently, the planning board's final decision on a complex subdivision or site plan application will include within it the planning board's determination of how the zoning ordinance applies to the proposal, and how the planning board's subdivision and/or site plan regulations should be interpreted and applied to the project. (See Hoffman v. Town of Gilford, 147 N.H. 85 (2001), a case which foreshadowed the result of Heartz case). Under the state of the law after Heartz, to preserve their rights the unhappy party must first appeal the purely zoning questions to the ZBA under RSA 676:5, III while at the same time appealing the planning issues (those arising from the application of the subdivision and site plan regulations) directly to the superior court under RSA 677:15! In such a case, the superior court would no doubt be willing to put a hold on any proceedings in the direct appeal from the planning board until the zoning issues either were resolved once and for all at the ZBA, or also came up on appeal from the ZBA where they could then be consolidated with the direct appeal from the planning board and tried at the same time. Awkward.

This split appeal process is what is classically referred to in law schools as a trap for the unwary, and will no doubt be the source of grief in the future. It doesn't have to be this way. When the legislature amended the statutes to give the ZBA an opportunity to review disputes about the planning board's interpretation of the zoning ordinance, it could not know that the court would eventually interpret that appeal process to be mandatory. The legislature is free to tinker with the process if it does not approve of the post-Heartz world we are at least temporarily inhabiting!

### **BOARD OF SELECTMEN IS THE ONLY TOWN BOARD THAT CAN APPEAL A ZBA DECISION TO SUPERIOR COURT**

Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment,  
149 N.H. 63 (2003)

Well, it finally happened. Many of us were waiting for a case like this to come along to clear up an uncertainty in the statutes about which town boards or officials have authority to pursue an appeal of a ZBA decision to the courts.

In July, 2000 the Hooksett Conservation Commission reviewed an application for site plan approval submitted to the planning board for a convenience store and retail gasoline sales facility. The commission provided a memo to the planning board stating its determination that the zoning ordinance prohibits automobile service or repair shops in the proposed location. The planning board sought an interpretation of the zoning ordinance from the town's code enforcement officer, who then issued a formal zoning interpretation in which he concluded that the proposed use is permitted under the zoning ordinance. The conservation commission appealed the CEO's formal interpretation to the ZBA under RSA 676:5, and the ZBA upheld the CEO's ruling that the use is permitted. The conservation commission then filed a request for rehearing with the ZBA under RSA 677:2 which was denied, and then appealed the ZBA's decision to superior court under RSA 677:4.

The ZBA filed a motion to dismiss the appeal, arguing that the conservation commission had no authority to appeal to the court (had no standing to bring the case to the court) under the language of RSA 677:4. The superior court denied the ZBA's motion to dismiss and then ultimately issued an order agreeing with the conservation commission that the proposed use was prohibited in that location under the zoning ordinance. The ZBA then appealed to the supreme court.

To make a long story short, after a lot of comparison of the history of changes to the three relevant statutes and a consideration of the policy issues involved, the supreme court ruled that the conservation commission could file an appeal with the ZBA in the first instance, but is not allowed to apply for a rehearing to the ZBA if it gets an answer it doesn't like, and is not allowed to take the issue to the courts. The supreme court ruled that under the statutes, only the selectmen are clearly given the authority to not only appeal to the ZBA in the first place, but then to file for a rehearing with the ZBA if the selectmen are not happy with the ruling and then take an appeal to the courts if the ZBA sticks to its original result.

The supreme court reached this result because although RSA 676:5, I permits any person aggrieved or . . . any officer department, board or bureau of the municipality affected by any decision of the administrative officer to appeal the initial zoning determination to the ZBA, the language of RSA 677:2 and RSA 677:4 which govern the process after that is not so clear. Instead, RSA 677:2 says that the selectmen, any party to the action or proceedings, or any person directly affected thereby may file for a rehearing with the ZBA, and RSA 677:4 allows any person aggrieved (which includes any party entitled to request a rehearing under RSA 677:2) to appeal to the superior court. The supreme court ruled that the legislature did not intend to include town boards or officials within the definition of who is a party under RSA 677:2 with a right to pursue the matter.

The supreme court really had to struggle with this one, because neither the long legislative history of changes to the statutes, nor the current language of the statutes



provides a clear answer to the question. To provide that answer, the court considered the policies sought to be advanced by the appeal process, and became Apersuaded that the legislature did not intend for all municipal boards to have standing to move for rehearing and to appeal the ZBA=s decision to the superior court.@ In support of that conclusion the court wrote the following (case citations, ellipsis and quotation marks omitted):

The policy considerations stem from the fact that there are undoubtedly many instances when a municipal board may disagree with a ZBA's interpretation of a zoning ordinance. If municipal boards were permitted to appeal in every such instance, the prompt and orderly review of land use applications would essentially grind to a halt. Suits by different municipal boards could cause considerable delays and thus unfairly victimize property owners, particularly when no party directly affected by the action such as abutters has seen fit to challenge the application. Public funds will also be drawn upon to pay the legal fees of both contestants, even though the public's interest will not necessarily be served by the litigation. Finally, to permit contests among governmental units is to invite confusion in government and a diversion of public funds from the purposes for which they were entrusted. Practical politics being what they are, one can readily foresee lively wrangling among governmental units if each may mount against the other assaults. Such wrangling among governmental units should be minimized. In light of the above policy considerations, we conclude that the legislature did not intend to grant standing to request a rehearing to all municipal boards that may initiate an appeal under RSA 676:5.

Of course, the legislature is free to amend the appeal statutes in light of this decision, and the supreme court respectfully invited the legislature to do so if it believes the court misinterpreted the legislature=s intent.

### **WHEN LAND USE DECISIONS ARE NOT CLEAR**

### **ZBA WASN=T CLEAR ABOUT WHICH VARIANCE TESTS WERE NOT MET, AND THE SUPERIOR COURT WASN=T CLEAR ABOUT APPEAL REQUIREMENTS!!**

Robinson v. Town of Hudson, 149 N.H. 255 (2003)

This most confusing case started out simply enough. Michelle Robinson owns an old subdivision lot on Mark Street in Hudson that was approved in 1970. Because the planned road improvements were never done, Robinson=s lot has only 50 feet of road frontage instead of the 150 feet required under the zoning ordinance. Robinson applied for a variance from the frontage requirement, which the ZBA denied. The ZBA=s Notice of Disapproval specifically found that she failed to meet two of the five conditions for a variance (#1 - the variance would not be contrary to the public interest, and #2 - substantial justice would not be done) (see RSA 676:3, which requires both the ZBA and the planning

board to issue written decisions -- if the decision is a denial, the reasons for the denial have to be spelled out in the written decision).

The superior court denied Robinson's appeal on the grounds that she did not challenge the ZBA's decision on all five of the variance grounds when she filed her motion for rehearing with the ZBA!! The supreme court ruled (correctly) that RSA 677:3 does not place a burden on an applicant to raise in a motion to reconsider variance conditions that were not specifically denied by the ZBA.

The town tried to argue that the ZBA did base its denial on each and every one of the five variance conditions, but based on the evidence the supreme court said

“ . . . the evidence presented is insufficient to demonstrate that the ZBA concluded that the petitioner did not meet any of the variance conditions. The worksheet of one member is missing from the record and the remaining worksheets contain votes that are neither unanimous nor clear. The worksheets and minutes are inconclusive as to the findings of the ZBA. As such, the record does not support the trial court's finding that the petitioner failed to meet any of the five conditions for granting a variance.@

Because the premise for the superior court's ruling dismissing Robinson's appeal was legally incorrect (the faulty requirement that her motion for rehearing to the ZBA had to include all five variance conditions even if the ZBA's denial was based on less than all five), the supreme court reversed the dismissal and sent the case back down to the superior court.

**PRACTICE POINTER:** Although the superior court didn't help things, most of the confusion in this case does seem to arise from unclear records of the ZBA's actions. It can't be emphasized too strongly that both the ZBA and the planning board must strive to create a clear record of what was decided, supported by a description of what facts were found by the board to support each decision!

**LIMITATION ON AREA SUBJECT TO VARIANCE AND SPECIAL EXCEPTION MUST BE CLEARLY STATED TO BE ENFORCEABLE**

**(NCES I)**

North Country Environmental Services, Inc. v. Town of Bethlehem,  
146 N.H. 348 (2001)

This is the first of two cases to reach the supreme court, each of which arose from years of disputes between successive owners of a solid waste landfill in Bethlehem on one hand and the town and concerned citizens on the other. Although the facts and the law involved in the court's decision are complex and peculiar to the situation in Bethlehem,

there is one guiding principle that comes out of the decision that offers instruction to all of us who are connected in any way with planning and zoning matters. That principle is: the need to strive for clarity in the use of the English language. Clarity most often results from the expression of simple concepts using simple words. Let's see how failure to follow that principle determined the basic outcome of this case.

Harold Brown owned an 87 acre parcel in Bethlehem. In 1976 he received a variance to operate a landfill, and obtained State approval for the landfill within a four acre footprint on the property. In 1977 the State allowed him to expand the footprint by about an acre; Mr. Brown did not seek any further town approval for that expansion.

In 1983, Mr. Brown received planning board approval for a ten acre subdivision for landfill use, then sold the lot to Sanco, Inc. In 1985, Mr. Brown got approval to subdivide an additional 41 acres for landfill use, and also sold that lot to Sanco.

In 1985-1986, Sanco received a special exception to expand the existing landfill onto the 41 acre parcel. Over the next few years, Sanco received permission from the State to expand the landfill in two stages and several phases, and then sold the entire property to North Country Environmental Services, Inc. (ANCES@).

In 1999, the town petitioned the superior court to stop the expansion of the landfill under the State permits, alleging among other things that the expansion was an unlawful expansion of a nonconforming use in violation of the 1976 variance; NCES also filed a petition with the court, asking it to declare that it has the right to gradually expand the landfill onto the entire 87 acres.

The town argued that the 1976 variance contained a limit on the area that the landfill could occupy on the 10 acre parcel. The supreme court agreed with the superior court that the variance contained no such limitation, and pointed out that the scope of a variance is dependent upon the representations of the applicant and the intent of the language in the variance at the time it is issued (quoting Dahar v. Department of Bldgs., 116 N.H. 122, 123 (1976)). The court found there was simply no language in the variance which expressly limited the area to be used for landfiling, and the ZBA's notice of decision to Mr. Brown simply states that the variance request is granted and approved, subject to complete state approval and subsequent supervision.@ Also, although the variance application contained a crude map@ showing the proposed landfill's approximate location, it contained no statement of the landfill's expected dimensions. Although the town argued that a limit on the size of the landfill should be *implied* by the reference to the need for future State approval and supervision, the court did not agree that any such implication was strong enough to be enforceable against the landowner.

The town also argued that the 1985-1986 special exception regarding the 41 acre parcel should also be interpreted to contain a limitation on the size of the landfiling that could occur there. As with the variance, there was simply no express limitation contained

in the grant of the special exception, and the evidence in support of some *implied* limitation was just too flimsy.

**PRACTICE POINTER:** If the ZBA had intended to limit the size of the landfill that could be constructed under the variance, it could have easily done so using simple words, and by requiring the limited area to be shown on a plan that was then clearly incorporated as part of the grant of the variance.

When we sit as land use board members, it is helpful to step back for a minute and try to imagine what questions about the proposed use might come up years in the future, and then try to find clear answers to those questions in the material that is before the board, or being generated by it in the form of minutes, lists of conditions, draft notices of decision and so forth. If there isn't a clear answer to the question in the record, that's a gap that can and should be filled before final approval is granted!

## **STATE PREEMPTION OF REGULATION OF LOCAL LANDFILLS**

### **TOWNS HAVE SOME AUTHORITY TO REGULATE SOLID WASTE DISPOSAL FACILITIES**

#### **(NCES II)**

North Country Environmental Services, Inc. v. Town of Bethlehem,  
(March 1, 2004)

In the first supreme court battle between these parties, reported above, NCES had urged the court to declare that the Solid Waste Management Act, RSA Chapter 149-M, preempted two zoning provisions adopted by the town in 1987 and 1992, as follows:

1987: no private solid waste disposal facility is allowed in any district;

1992: no solid waste disposal facility may be located in any district, and no existing landfill may be expanded, unless the town itself owns the facility.

In the first case, the supreme court did not have to reach the question of whether these zoning provisions were preempted, but the issues that had to be decided in this second case put question of preemption squarely before the court. The zoning question had to be decided because the town challenged the legality of a State permit issued to NCES to develop Stage IV of the landfill, nearly all of which was outside of the fifty-one acres that the landfill could occupy under the decision in NCES I.

#### **Tests for State Preemption of Municipal Regulation**

The supreme court first discussed the general contours of the doctrine of preemption, which asks whether local authority to regulate a particular use of land under the zoning enabling legislation is preempted by state law or policy. The court said the following questions must be answered to determine whether the state has preempted a particular field such as the siting of solid waste disposal facilities:

- & does the local ordinance conflict with state law
- & is the state law, expressly or impliedly, intended to be exclusive
- & does the subject matter reflect a need for uniformity
- & is the state scheme so pervasive or comprehensive that it precludes the existence of municipal regulation
- & does the local ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature.

The court next reviewed the details of the statute itself, RSA 149-M, and the administrative rules adopted by the Department of Environmental Services to implement the statutory scheme of state regulation. Not surprisingly, the court concluded that “RSA Chapter 149-M constitutes a comprehensive and detailed regulatory scheme governing the design, construction, operation and closure of solid waste management facilities. Such exhaustive treatment of the field ordinarily manifests legislative intent to occupy it.”

### **Legislature Leaves Some Room for Municipal Regulation**

Although the court found the state scheme to be comprehensive and detailed, that finding did not decide the outcome of the dispute because in RSA 149-M:9, VII the legislature has authorized some level of municipal regulation. That section provides:

The issuance of a facility permit by the department shall not affect any obligation to obtain local approvals required under all applicable, lawful local ordinances, codes, and regulations not inconsistent with this chapter. Local land use regulation of a facility location shall be presumed lawful if administered in good faith, but such presumption shall not be conclusive.

NCES urged the court to interpret this language to mean that a private solid waste facility may be subject only to local regulation of the location of the facility. The supreme court rejected that interpretation, which would have required the court to ignore the word “all” (referring to local ordinances, codes, and regulations) in the first sentence of the provision. However, the court did point out that, “were it not for this provision, we would agree with NCES that RSA Chapter 149-M completely preempts the field of solid waste management regulation.” Moreover, the comprehensiveness and detail of the State scheme requires that the section allowing some local regulation be interpreted “narrowly.”

Thus, “when evaluating whether a particular local regulation conflicts with the State scheme, courts should err on the side of finding State law preemption, unless the local regulation concerns where, within a town, a facility may be located.” (emphasis added.)

### **1992 Zoning Amendment Is Allowed Under RSA Chapter 149-M**

The court went on to rule that RSA Chapter 149-M does not, on its face, preempt Bethlehem’s 1992 zoning amendment, because the amendment does not prohibit that which RSA Chapter 149-M permits or vice versa.<sup>4</sup> Thus although NCES had acquired the right as a result of the first supreme court decision to completely use the 51 acre site for its solid waste facility, RSA Chapter 149-M does not on its face invalidate the town’s 1992 zoning amendment that has the effect of prohibiting NCES from using the other 36 acres of its land for expansion of the landfill. As the court explained

The town currently complies with RSA chapter 149-M by granting its residents access to NCES’ landfill. See RSA 149-M:17, I; see also RSA 149-M:23-:25. Under these circumstances, it does not violate RSA chapter 149-M for the town to prohibit development of the portion of [the landfill] that falls outside of the fifty-one acres. We agree with the trial court that, with the 1992 amendment, the town has not exempted itself from its obligation to partake in the State plan of integrated solid waste management. The amendment indicates that, in the future, presumably when there is no additional capacity in NCES’ landfill on the fifty-one acres, the town will either provide its own facility or assure its residents access to another approved facility. See RSA 149-M:17, I; see also RSA 149-M:23-:25.

### **But, the 1992 Zoning Amendment Might Be an Unlawful Exercise of the Zoning Power!**

Although the 1992 amendment is not preempted by RSA Chapter 149-M, NCES also argued that it is an unlawful exercise of the zoning authority for two reasons: (1) the zoning amendment distinguishes between users of land, not uses of land, contrary to the ruling in Vlahos Realty Co. v. Little Boar’s Head District, 101 N.H. 460, 463-64 (1958); and (2) it contravenes the general welfare of the region it affects, contrary to the teaching of Britton v. Town of Chester, 134 N.H. 434, 441 (1991).

The supreme court did not decide this question, wisely taking the view that because “the trial court did not address these arguments and as resolving them might require additional factual findings, we remand them to the trial court for resolution in the first instance.” The result of all this is that, as of this writing (March 29, 2004), we do not yet

---

<sup>4</sup>The supreme court’s opinion does not decide the legality of the 1987 zoning amendment; the superior court ruled that the amendment is invalid because it is inconsistent with RSA Chapter 149-M.

finally know whether Bethlehem will be able to stop the expansion of the landfill across the boundary of the 51 acres that it originally permitted.

**Some of the Town's Site Plan Regulations May be Applicable to the Area Beyond the 51 Acres**

In other cases where the State has enacted a detailed and comprehensive regulatory scheme such as RSA Chapter 149-M, the court has allowed towns to apply site plan review regulations to the regulated project if it does so "in good faith and without exclusionary effect." In other words, the site plan regulations cannot be applied to prohibit a project that receives State approval under the comprehensive State scheme. Some local activists thus argue that the power to apply some local site plan regulations to such projects is the municipal equivalent of being allowed to rearrange the deck chairs on the Titanic. In any event, the court confirmed that the town would be able to apply such non-exclusionary site plan regulations to the area beyond the 51 acres, but that ruling may be moot if the town is ultimately able to prohibit the expansion of the landfill into the remaining acreage under its 1992 zoning amendment.

**MISCELLANEOUS**

**ONLY AN UNCONSTITUTIONAL LAND USE ORDINANCE WILL LEAD TO AN AWARD OF MONEY DAMAGES FOR A TAKING@**

Torromeo v. Town of Fremont and MDR Corp. v. Town of Fremont,  
148 N.H. 640 (2002)

These two cases eventually became joined at the hip, but started out life as separate challenges to the Town of Fremont's growth control ordinance. Torromeo is the developer of a twenty-seven lot residential subdivision know as Mason's Corner. After all but five lots were sold, the town stopped issuing building permits under its newly enacted growth control ordinance. Torromeo and a prospective purchaser of lots sued the town, seeking to require it to issue a building permit to the buyer. The trial court ruled that the subdivision was exempt from the growth control ordinance under the grandfathering provisions of RSA 674:39 and ordered the town to issue the building permit.

MDR is the developer of a fourteen lot subdivision and was originally issued five building permits, but was later informed that under the growth control ordinance no more permits could be issued for quite some time. MDR also sued the town, arguing that the growth control ordinance was invalid because the town had never legally adopted a capital improvement program (CIP), which is a prerequisite to the adoption of a growth control ordinance under RSA 674:22. The trial court agreed that the town had never validly adopted the growth control ordinance, and the supreme court had upheld that ruling in an earlier case.

Following their successful attacks on the town's growth control ordinance, Torromeo and MDR filed separate lawsuits against the town seeking money damages caused by the temporary taking of their property from the time building permits had been denied under the invalid growth control ordinance until the permits were finally issued. The town argued that money damages for a temporary taking could only be awarded if the plaintiffs had shown that the growth control ordinance was unconstitutional, not merely unenforceable. After some confusing legal maneuvers, the superior court agreed with the plaintiffs and awarded them a substantial amount of money damages.

The town appealed to the supreme court, which reversed the award of money damages. The court clarified some language in an earlier case by ruling that money damages are only available to a plaintiff where the ordinance at issue is found to be unconstitutional and constitutes a taking (temporary or permanent) of the plaintiff's property. If the ordinance is merely invalid for some reason other than unconstitutionality, and thus unenforceable, as was Fremont's growth control ordinance, the only remedy the successful landowner is entitled to is an order forcing the town to issue the building permits that were erroneously denied.

**ZBA CANNOT GRANT A SPECIAL EXCEPTION IN THE HOPE THAT THE PLANNING BOARD WILL CLEAN UP THE MESS!!**

Tidd v. Town of Alton, 148 N.H. 424 (2002)

The Holts own a forty-four acre tract of land located in a rural zoning district along County Road in Alton. After denying two previous applications, the ZBA approved a third application for a special exception to allow the Holts to develop a campground on the property with 100 campsites, and the angry abutters appealed. The superior court reversed the ZBA's approval and the supreme court agreed with that result.

In order to grant a special exception under the Alton Zoning Ordinance, the ZBA was required to find that the applicant meets several conditions including the following two:

There is no undue nuisance or serious hazard to pedestrian or vehicular traffic, including the location and design of access ways and off-street parking.

The proposed use or structure is consistent with the spirit of this ordinance and the intent of the Master Plan.

The supreme court repeated the rule that in considering whether to grant a special exception, zoning boards may not vary or waive any of the requirements set forth in the zoning ordinance – also, there must be sufficient evidence before the ZBA to support favorable findings on all of those requirements.



In this case, the record showed that the ZBA received testimony that the proposed campground would create serious traffic hazards that could only be resolved if the planning board and/or the NHDOT acted by taking land, redesigning the intersection and pruning some trees and brush. Because of these unresolved traffic hazards, the superior court also concluded that the plan would not promote the public health, safety and general welfare as required by the zoning ordinance, and thus would not be consistent with the spirit of the ordinance.

The supreme court agreed, holding that "by granting the special exception in the face of serious traffic hazards, the ZBA unlawfully waived or varied the conditions [for special exception] of the zoning ordinance."

**TOWN MAY APPLY GROWTH CONTROL ORDINANCE UNLESS IMPACT FEES  
ALREADY PAID OR ASSESSED**

Monahan-Fortin Properties, LLC v. Town of Hudson  
148 N.H. 769 (2002)

This case involves the court's interpretation of RSA 674:21, V(h) which states:

"The adoption of a growth management limitation or moratorium by a municipality shall not affect any development with respect to which an impact fee has been paid or assessed as part of the approval for that development." (emphasis added.)

The developer/plaintiff sought approval to construct a 101-unit elderly housing condominium known as Riverwalk along the Merrimack River in Hudson. When the developer filed its site plan application the town already had an impact fee ordinance in place, but there was a dispute about whether the application would be exempt from a newly proposed growth management ordinance. Although the developer and the town battled about whether the site plan should have been (or was in fact) formally accepted by the planning board as complete before the first public notice of the growth management ordinance was published, the superior court ruled that the development was exempt from the growth control ordinance under the above quoted statute because impact fees "would inevitably be assessed or had, in fact, been assessed against the plaintiff." This point was the only issue appealed to the supreme court, and based on the plain language of the statute it disagreed with the lower court.

The record was clear that the developer had not actually paid an impact fee, so it couldn't fit into that part of the statute. However, in its site plan application the developer stated the specific amount of the impact fees it would have to pay under the town's ordinance, and the town acknowledged that it had preliminarily calculated the amount of the impact fees that were to be charged to the project. The superior court held that the statute was satisfied because it seemed "inevitable" that the developer would end up having to pay the impact fee, and therefore concluded that an impact fee had been

"assessed." As a result, it ruled that the town could not also apply its growth control ordinance to the project.

The supreme court disagreed, although it declined to precisely define the meaning of "assessed" in this context. Instead, the court said that it was sufficient to state that

"a preliminary estimate of an impact fee by a municipality does not constitute an assessment within the meaning of the statute, and that a municipality does not assess fees implicitly by merely receiving an application wherein fees are represented."

Instead, the supreme court said the plain language of the statute should have been followed by the superior court: since an impact fee had not already been paid or assessed (past tense) when the growth control ordinance came along, the town could apply both impact fees and growth control restrictions to the development.

**DO NOT FORGET TO CERTIFY SUBDIVISION AMENDMENTS AND FILE THEM WITH THE TOWN CLERK!! -- IN THIS CASE, THE APPLICATION SHOULD HAVE BEEN ACCEPTED BY PLANNING BOARD, EVEN THOUGH THE APPLICATION DIDN'T COMPLY WITH THE NEW SUBDIVISION RULE**

Rallis v. Town of Hampton Planning Board, 146 N.H. 18 (2001)

Mr. Rallis proposed a six-lot subdivision that included a road which abutted two lots in an adjoining subdivision that already had frontage on an existing road. The proposed design therefore created two double-fronted lots, i.e., lots abutted by roads at the front and rear property lines. After several contacts with the planning board and the town's circuit rider planner about the content of his subdivision application, Mr. Rallis submitted the application and filing fee to the planning board on **September 16, 1997**.

Earlier, on **September 4**, the planning board had posted notice of a public hearing for a proposed amendment to the subdivision regulations that prohibited subdivision roads that created double-fronted lots like the two in Mr. Rallis's application. The same notice of public hearing was published in the newspaper on **September 5**.

At the public hearing on **September 17** the planning board voted to approve the amendment, but it did not certify the amendment until **October 1** and did not file the required certification with the town clerk (see RSA 675:6, III) until **October 2**.

At its hearing on **October 1**, the planning board voted not to accept jurisdiction of the subdivision application because it:

- (1) did not include written waiver requests for the double-fronted lots; and

- (2) presented too many design issues which ultimately could be reconfigured and submitted at a later date.@

Mr. Rallis appealed to superior court, which ruled that the planning board should have accepted the application. The town appealed, and the supreme court agreed with the superior court.

**Subdivision Amendment Not Effective Until it Is Certified And Filed With Town Clerk**

On appeal, the town first argued that the subdivision amendment became effective on **September 4** or **September 5**, the date of the first published notice, under the provisions of RSA 676:12, I, V. Because the application submitted on **September 16** contained plans for double-fronted lots in violation of the amendment, the planning board argued that it properly declined to accept jurisdiction. The supreme court disagreed, pointing out that under RSA 675:6, III the amendment did not legally become effective until it was certified by the planning board and filed with the town clerk. Thus, the supreme court drew a distinction between the effect of the two statutes, and a corresponding distinction between a planning board taking jurisdiction over an application, which is at issue here, and formal consideration of an application *after accepting jurisdiction*.@ (emphasis added.)

In other words, the supreme court agreed that Mr. Rallis's application was subject to the new amendment, because the application was not formally accepted by the planning board prior to the first legal notice of the amendment. However, the court said that RSA 676:12, V cannot be relied upon by the planning board to deny jurisdiction over the application, since the application had not taken legal effect when the board voted to decline jurisdiction.

**PRACTICE POINTER:** I think the most important issue to be highlighted in this case is the fact that neither the subdivision regulations themselves nor any amendment to them are legally effective until a copy has been certified by a majority of the planning board and filed with the town clerk as required under RSA 675:6, III. (**Note: The same statute also applies to site plan regulations, so the same rules apply to the site plan process!**)

That is not a mere request, it is a fundamental requirement that might well determine the outcome of litigation over the denial of a subdivision application and leave a town, at least temporarily, without any enforceable subdivision regulations at all!! It is worth checking with your town clerk to see if the regulations and any amendments have been properly certified and filed. If the town clerk can't find them, you best assume it hasn't been done and touch base with your town counsel about what action to take!!

**Offer to Revise Subdivision Plan Does Not Make it Incomplete**

The town also argued that the applicant's offer to revise or redesign the plan to satisfy various planning board concerns, after submitting the application, rendered the application incomplete. The supreme court disagreed.

Under RSA 676:4, I(b) a completed application means that sufficient information is included or submitted to allow the board to proceed with consideration and to make an informed decision. The court pointed out that the plaintiff's application included detailed subdivision plans and the other items required by the subdivision regulations. Thus, the court ruled, the application was sufficiently complete for the board to exercise jurisdiction over it; the fact that the plan might be revised as it went through public hearing and planning board review does not render it incomplete at the time it is submitted for formal acceptance.

**PRACTICE POINTER:** Understandably, planning boards sometimes get frustrated with the changes that must be made to a subdivision plan to get it to the point where the legitimate planning concerns are addressed; we sometimes hear comments like: "We're not here to design your project for you!!" I think this case stands for the notion that within very broad limits, it is the job of the planning board to work with applicants to make the changes that are needed to eliminate planning concerns. The fact that the proposal is not perfect when it comes in the door is not ground to refuse to accept it, or refuse to work the plan through the process.